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Sheila Venable
Assignment Judge

Martin Cronin, J.S.C.

Mark S. Ali
Presiding Judge

50 West Market Street, Chambers 808, Newark, NJ 07102

Martin.Cronin@njcourts.gov • Tel: 973-776-9618

June 9, 2022

Hon. Glenn A. Grant, J.A.D.
Administrative Director of the Courts
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Recommendation 25 of the Judicial Conference on Jury Selection ("JCJS")

Dear Director Grant:

A. Introduction.

Please accept this letter commenting on JCJS recommendation 25[1] to modify Rule 1:8-3. This Rule specifies the procedure for challenging the exercise of a peremptory challenge under the existing Batson/Gilmore paradigm. (JCJS II at 37-38). For the reasons set forth in my June 8, 2022, comments to the JCJS, peremptory challenges should be eliminated. (Comment R.13 at 2.) If the JCJS decides not to recommend elimination, then I reluctantly propose a vastly less preferable alternative (hereinafter "Alternative Proposal").

My reluctance arises from the great drawback of all proposals short of elimination – it acquiesces to continued invidious discrimination in jury selection. This acquiesce arises from this Alternative Proposal's preservation of counsel's ability to excuse a limited number of jurors for reasons which are legally insufficient to satisfy even a more relaxed cause standard of JCJS recommendation 14.

This alternative proposal consists of three interrelated steps:

1. Counsel seeking to exclude the juror (hereinafter "striking party") must first exercise a cause challenge,

2. If the cause challenge is denied, then the striking party may exercise a limited number of newly defined "discretionary challenges," and
3. If opposing counsel (hereinafter "objecting party") or the trial court requests, then the striking party must establish that an "objective observer" would not find that the striking party's removal of a prospective juror was based upon that juror's race.[2]

A substantial reduction of discretionary challenges (Step 2), accompanied by requirements to first challenge for cause (Step 1) and to shift the burden of persuasion to the striking party (Step 3), would not only significantly decrease the opportunity to misuse discretionary challenges, but also would increase the trial court's ability to determine whether such abuse occurred.

The procedure proposed herein replaces peremptory challenges with a more transparent, but equally arbitrary alternative, the "discretionary challenge." This proposal squarely shifts the burden of persuasion to the striking party. This alternative is designed to more fully advance the litigant's interest in a fair and impartial jury, drawn from a fair cross section of the community. Equally significant, this alternative expressly recognizes, and consciously advances, the rights of prospective jurors to fully participate in our democracy through jury service.

B. Relationship Among Remedies.

The JCJS modeled their proposed R. 1:8-3 upon Washington's GR 37, which, in turn, sought to remedy deficiencies in the Batson paradigm. (JCJS II at 37-42). While Washington's GR 37 promises to be more effective than that paradigm,[3] members of the Washington Supreme Court recognized that the optimal response to racial discrimination in jury selection is to eliminate peremptory challenges. See State v. Saintcalle 178 Wn. 2d. 34, 57 (2013). However, some members of that Court interpreted the Washington Constitution to provide some protection to peremptory challenges. See Saintcalle, 178 Wn. 2d. at 67 (Johnson, J, concurring)(dictum), interpreting, Wash. Constit., Art. I, Section 21. In view of these perceived constitutional limitations, Washington Supreme Court Chief Justice Steven Gonzalez suggested that GR 37 reflected a compromise to the preferred remedy of elimination. (See JCJS Panel, Toward Representative Juries, at 18:45-21:30 (Gonzalez, C.J.)).

In contrast, there is no right to a peremptory challenge secured by the New Jersey Constitution. State v. Hoffman, 82 N.J. 184, 187 (1980), discussed in, Ex. A. at 5. Thus, unlike drafters of Washington GR 37, the JCJS does not face any state constitutional limitations upon a recommendation to eliminate peremptory challenges. Equally significant, the burdens of production and persuasion contained within any modification of the Batson/Gilmore paradigm are not constitutionally grounded.[4]

C. The Underlying Right of Prospective Jurors to Fully Participate in our Democracy through Jury Service.

Although not constitutionally grounded, the burdens of production and persuasion within the Batson/Gilmore paradigm adversely affect the constitutionally protected interests of prospective jurors. (See 4-5 infra, Comment 13 at 10). This Alternative Proposal expressly acknowledges these interests and seeks to protect them through a reallocation of these burdens of production and persuasion to the striking party.

The JCJS guide observes that, "[w]hether viewed as an obligation or an opportunity, the *right to serve as a juror* is essential to our democracy." (JCJS I at 18 (emphasis added)). This right is recognized by implication in judicial decisions deciding equal protection and fair cross section challenges to the exercise of peremptory challenges. (See 4-5, infra). The Constitutional and public policy origins of this right are more thoroughly discussed in the following sections.

1. As a matter of procedural due process, the New Jersey Constitution requires that trial counsel articulate a legally cognizable reason why a prospective juror should be deprived of their opportunity to fully participate in our democracy through jury service.

Although our State Constitution "does not enumerate the right to due process," Article I, Para. 5 "protects 'values like those encompassed by the principle [] of due process.'" State v. Robinson, 229 N.J. 44, 75 (2017), quoting, Doe v. Poritz, 142 N.J. 1, 99 (1995). Article I, paragraph 1 has also been broadly interpreted "to embrace the fundamental guarantee of due process." State v. Melvin, 248 N.J. 321, 347 (2021).

Procedural due process requires an assessment of (1) whether a constitutionally protected interest has been interfered with by government action and (2) whether the procedures attendant upon that deprivation are constitutionally sufficient. Doe, 143 N.J. at 100.

(a) The Doe first prong is satisfied, as prospective jurors have a constitutionally protected interest to fully participate in our democracy through jury service.

Interpreting the Equal Protection Clause of our Federal Constitution, the United States Supreme Court in Powers v. Ohio observed that "although an individual juror does not have the right to sit on any particular petit jury, he or she does possess the right not to be excluded on account of race." 499 U.S. 400, 409 (1991). Thus, the Powers Court implicitly recognized an underlying Federal right or constitutionally protected interest to serve on a jury. To decide the equal protection challenge presented, the Powers Court was not required to affirmatively define the breath or scope of a prospective juror's right. It did, however, reaffirm that this right exists and reiterated that it cannot be abridged on the basis of race. Id. at 407-09. Accord Andujar, 247 N.J. at 297 interpreting, N.J. Const. Art. I, Para. 5.

The Powers Court acknowledged that its earlier Batson decision recognized that the discriminatory use of peremptories harms the excluded jurors by depriving them of a significant opportunity to participate

in civil life. 499 U.S. at 409. Emphasizing the importance of this participation, the Powers Court further observed that "[t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." Id. at 406. Apart from voting, most citizens view "the honor and privilege of jury duty as their most significant opportunity to participate in the democratic process." Id. at 407. Although variously referring to it as a "right," "duty," or "obligation," the Powers Court recognized that serving on a jury is an interest protected under the Federal Constitution. Id. at 407-09.

In New Jersey, this juror right is even more clearly recognized than under the Federal Constitution. Despite the absence of express "due process" language, our State Constitution has been interpreted to provide more protections for individual rights than are afforded under the Federal Constitution. Melvin, 248 N.J. at 347 (due process requires "fundamental fairness" in judicial sentencing decisions). Accord Andujar, 247 N.J. at 300 (equal protection). Accordingly, in Andujar, our Supreme Court observed that the exercise of a peremptory challenge upon prospective juror F.G. "implicates Constitutional concerns regarding that person's *right* to sit on a jury." 247 N.J. 275, 297 (2021) (emphasis added). Accord. Ex. A. at 10-11, quoting, Kenneth J. Melilli, Batson in Practice: what We Have Learned About Batson and Peremptory Challenges, 71 Notre Dame L. Rev. 447, 453(1996)("Batson only makes analytical sense if one recognizes that it has shifted the primary focus from the rights of the litigants to the prospective jurors"). Thus, in deciding a litigant's equal protection challenge, the Andujar Court interpreted our State Constitution to afford some residual right of a prospective juror to serve on a jury. Id. This juror right is independent from any litigant right.

While the Powers and Andujar Courts recognized these residual juror rights during equal protection litigation, these rights have also been recognized in fair cross section litigation. As the JCJS recognizes in its Guide, apart from the litigant's interests, "the constitutional guarantee of fair cross section can be understood as a promise to the community that all of its members can participate in the administration of justice." (JCJS I at 18).

Since preemptory challenges are exercised during a trial, the "government action" requirement of prong one is satisfied. See Georgia v. McCollum, 505 U.S. 42, 55 (1992)(equal protection applies to strike by criminal defendant), Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618-19 (1991)(equal protection applies to strike by civil litigant).

(b) The second Doe prong is satisfied, as the present exercise of peremptory challenges functions to deprive prospective jurors of their constitutionally protected interest.

To assess the second prong, our Supreme Court has consistently applied the balancing test outlined in Matthews v. Eldridge, 424 U.S. 319, 335 (1976). See e.g., Robinson, 229, N.J. at 75-76. The Matthews standard consists of three factors: "(1) 'the private interest that will be affected by the official action;' (2) 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value,

if any, of additional or substitute procedural safeguards;' and (3) 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" 424 U.S. at 335.

Prospective jurors have a constitutionally protected interest to serve on a jury, thereby satisfying the first Matthews factor. (See 3-4, supra). This right to sit on a jury is not unqualified. Subject to constitutional limitations,[5] States may impose statutory qualifications, such as age. See Powers, 499 U.S. at 407, Andujar, 247 N.J. at 310 & n. 5, JCJS I at E1-E4. Consistent with our Constitution, the existence of case specific bias provides a permissible basis to prohibit a prospective juror from serving on a particular jury. (See Ex. A. at 13-14). Therefore, it is submitted that *our State Constitution should be interpreted to recognize the right of all citizens to fully participate in our democracy through jury service unless the striking party can articulate a legally cognizable reason why a prospective juror could not fairly[6] and impartially fulfill their duties in a particular case.* As an alternative to peremptory challenges, where trial counsel need not provide any reason for excluding a juror, it is submitted that counsel be required to provide a legally cognizable reason why a prospective juror should be deprived of their right to fully participate in our democracy through jury service. (See Ex. A. at 3-4 (makes same recommendation, but not on due process grounds)). The judicially cognizable reason is a functional equivalent of a "cause" challenge. Id. at 4.

The value of this alternative to peremptory challenges is enhanced by recent advances in cognitive science. (Ex. A. at 3-4, 7-8, see also JCJS I at B1-B3 (implicit bias)). More specifically, implicit bias operates through our automatic ("fight or flight") cognitive system. A requirement to state a legally cognizable reason to exclude a juror activates the deliberative cognitive system and functions to "override" operation of the automatic cognitive system. (Ex. A. at 7-8, citing, Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection, 4 Harv. L.& Pol. Rev. 149, 156 (2010), cited in, JCJCS I at B-3. Reliance upon this "override" is a "best practice" to minimize the effect of implicit bias. Jury Letter at 7-8 & n. 57, citing, C. Jolls, and C. Sunstein, The Law of Implicit Bias, 97 Cal. L. Rev. 969, 973 (2007), listed as source material in, JCJS I at B-1. Accord J. Kang, M. Bennett et. als., Implicit Bias in the Courtroom, 59 U.C.L.A. L. Rev. 1124, 1177 (2012), listed as source material in, JCJS I at B-1. Indeed, the Andujar Court was able to explore the effects of implicit bias upon the State's decision to excuse juror F.G. only because it initially exercised a "cause" challenge which the trial court denied. 249 N.J. at 289-90. Hence, this alternative also promotes transparency and facilitates appellate review. (See Ex. A. at 3).

Addressing the third Matthews factor, the judiciary has supervisory authority over the jury selection procedure. See Andujar, 247 N.J. at 284. Therefore, the judiciary has both a non-delegable responsibility and a vital interest in protecting the integrity of that process lies at the heart of the entire criminal justice system. This alternative procedure of requiring "cause" imposes no additional fiscal burden upon any branch of government. Indeed, JCJS source materials demonstrate that the proposed

elimination of peremptory challenges would drastically reduce the number of jurors required to be summoned for jury service. (JCJS I at 8). Accordingly, it is submitted that each Matthews factor requires the exercise of a cause challenge as a matter of procedural Due Process.

2. As a matter of sound public policy, the Court should exercise its supervisory and rule-making authority to require litigants to articulate a legally cognizable reason to exclude a citizen from serving as a juror.

The JCJS provides the Court with an opportunity to implement reforms, designed to vindicate the constitutional rights of prospective jurors, which have not been squarely presented through litigation. In Powers, a White male defendant charged with murder objected under Batson to the State's use of peremptory challenges to remove seven Black venirepersons. 499 U.S. at 403. The objecting party (i.e., the State) challenged the criminal defendant's standing to raise that equal protection claim. The Powers Court rejected this standing argument. In doing so, the Court did not exclusively focus on the rights of the litigants, but also considered the right of the prospective jurors. Id. at 408-410. The Court concluded that the litigant had a sufficient interest in securing an untainted and enforceable verdict to be an effective proponent on behalf of the prospective juror. Id. To further support litigant standing, the Powers Court observed that "it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his or her rights." Id. at 410-16.

The Powers decision partly explains why the contours of a prospective jurors' right to serve on a jury has not been fully defined during the course of criminal litigation. In such litigation, juror rights are addressed only when one litigant refers to them in the course of an objection to the other litigants' effort to effectively exclude them through the exercise of a peremptory challenge. Trial counsel are not focused on the rights of prospective jurors but rather upon the interests of their clients. (See Comment 13 at 6). These practical realities of criminal litigation begs the question – *who speaks on behalf of the prospective jurors*? It is respectfully submitted that the JCJS should do so through its support of this alternative proposal.

D. The Alternative Proposal's Three Steps.

This alternative approach requires the striking party to: (1) exercise a cause challenge, (2) exercise a discretionary challenge and (3) persuade the court that an objective observer would not find that their removal of a prospective juror was based on the prospective juror's race. (See 1, supra.) These three (3) interrelated steps will be addressed *seriatim*.

1. The striking party must exercise a cause challenge.

This requires counsel to articulate a legally cognizable reason why this juror could not fairly and impartially decide this case. These challenges shall be decided under the relaxed standard of JCJS

recommendation 14. (JCJS II at 23). The exercise of a cause challenge (Step 1) is a condition precedent to the exercise of a discretionary challenge (Step 2). *The availability of discretionary challenges in Step 2 provides a "safety net" assuaging any legitimate litigant concerns arising from an arguably erroneous denial of a cause challenge in Step 2.* Cf. A. Clover, Hybrid Jury Strikes, 52 Harv. C.R.C.L. L. Rev. 357, 374-75 (2017)(proposing "hybrid strikes" which always require an articulated reason). See Ex. A. at 13-14,17-18 (addresses "safety net" argument).

The articulation of a reason supporting a cause challenge involves a deliberate cognitive process, overriding operation of the automatic cognitive system wherein implicit bias flourishes. See Ex. A. at 3-4, 7-8 (citing scientific research). This "cognitive override" is the most effective method to counteract the potentially corrupting effect of implicit bias. Id.

This requirement also facilitates meaningful judicial review. (See Ex. A. at 3). Indeed, the Andujar Court's analysis of the State's reliance upon racial stereotypes occurred only because prosecutor previously sought to excuse that juror for cause. 247 N.J. at 289-90. If the prosecutor only exercised a peremptory challenge, then the reasoning supporting their decision to exclude that juror would have been effectively shielded from judicial review. See id.

It is submitted that the availability of judicial review should not be conditioned upon trial counsel's tactical decision of which jurors to challenge for cause or through a peremptory strike. Indeed, for those jurors concerning whom counsel may most heavily rely upon racial stereotyping, the status quo provides a perverse incentive for counsel to forego a cause challenge and to exclude those jurors through a peremptory challenge. Step 1 precludes this gamesmanship and facilitates both transparency and judicial review.

If counsel's cause challenge is granted, then the juror is excused. If the cause challenge is denied, then that juror continues.

2. The striking party may exercise a substantially limited number of "discretionary" challenges.

A "discretionary" challenge is a term defined in this proposal. Cf. Clover, supra at 357, 360 ("hybrid" strike). They effectively replace peremptory challenges because counsel has already given the reasons supporting it during their cause argument. These proffered reasons were, by definition, legally insufficient to support a cause challenge. For example, an attorney may have a "hunch" that a juror would not be "favorably disposed" to their client's case. (See Comment 13 at 8). Although these "hunches" may reflect counsel's implicit bias and there is no right to a "favorable" jury, counsel's ability to excuse a limited number of these jurors may be the compromise which the Court must be willing to accept in order to secure legislative approval for a substantial reduction in the number of peremptory/discretionary challenges. (See Ex. A. at 5-7, 12-13, 18 (right to fair, but not favorable, jury), 10-11, 16 (danger inherent in preserving "hunch" challenges)).

This reduction must be substantial (e.g., from 20/12 to 3/3).[7] Since discretionary challenges retain much of the arbitrariness inherent in peremptory challenges, they also retain their corresponding potential for racially discriminatory use. The Step 2 compromise necessarily involves an implicit judicial toleration of some racial discrimination in jury selection. See R. Kennedy, Race, Crime, and the Law at 229 (1997). The great drawback of this proposal is that it formally permits continued racial discrimination. Comment 13 at 7. Such judicial acquiescence comes at a great cost in the public's perception of the integrity of both jury selection process and the judiciary itself. See Kennedy, supra at 229. In his remarks to the JCJS, Justice Albin acknowledged this cost by posing the rhetorical question – "is the removal of a single juror on the basis of race acceptable today?" JCJS Panel (Justice Albin). In order to minimize any legitimate public perception that any JCJS stakeholders, including the judiciary is acquiescing to racial discrimination in jury selection, it is submitted that the number of these jurors potentially excluded through discretionary challenges must be minimized.

3. If the objecting party or the court requests, then the striking party must sustain their burden of establishing that an "objective observer" would not find that their removal of a prospective juror was based on that juror's race.

This shifts the burden of persuasion to the party seeking to deprive the prospective juror of their right or opportunity to fully participate in our democracy and away from the party seeking to preserve that right. See Ex. A. at 11 – 12. This proper reallocation of the burden of persuasion was critical to Judge Bennett's support of both increased juror participation in voir dire and in the elimination of peremptory challenges. See M. Bennett, 4 Harv. L. & Policy Rev at 158 (voir dire), 167 (peremptories).

Shifting this burden to the striking party is also consistent with well-established principles for determining the proper allocation of evidentiary burdens of production and persuasion. See, e.g., State v. Wright, 401 N.J. Super. 142, 150 (App. Div. 2008), State v. Casavina, 163 N.J. Super. 27, 31 (App. Div. 1978). These principles place those burdens upon the party:

(1) relying upon establishment of the disputed fact,

(2) benefiting from superior access to relevant information or proofs,

(3) demonstrating greater expertise in evaluating the disputed fact, and

(4) possessing a lesser comparative interest arising from an adverse determination of the disputed fact.

See id. See also Norfolk So. Ry. Co. v. Intermodal Props., 424 N.J. Super. 106, 108 (App. Div. 2011)("[g]enerally burdens of persuasion and production are placed on the party 'best able to satisfy those burdens'"). While each of these factors is relevant, none are outcome determinative. Id.

Each of these factors support shifting the burden of persuasion to the party seeking to exercise a discretionary challenge. Since that party is relying upon the existence of some juror "bias," which counsel perceives as precluding them from being "fair,"[8] factor one supports the shift. Under the GR 37and

proposed R. 1:8-3 "objective observer" test, the relevant inquiry is the mental state of the striking attorney. See Ex. C. at 1-2. Clearly, the striking attorney has the best information concerning their own mental state. Applying factor two, the shift is further supported by the striking counsel's superior ability to marshal those facts, developed during voir dire[9] and tailor them to their theory of their case, which counsel relies upon to demonstrate juror "bias" and, inferentially, the absence of a racially discriminatory purpose in counsel's decision to strike that juror.

Concerning the third factor, the trial bar has consistently claimed that they are highly skilled at discerning juror bias. See e.g., Ex. B (Andujar oral argument). The scientific validity of this claim is dubious, particularly concerning implicit bias, see J. Kang and M. Bennett 59 U.C.L.A. L. Rev. at 1179, A. Page, Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.Y.U. L.Rev. 155, 156 (2005), cited in, Jury Letter (2019) at 7. Nonetheless, trial counsel's continued assertion of their superior "expertise" further supports allocating the burden of persuasion to them.

The fourth factor – comparative interest analysis – is closely related to the due process argument to eliminate peremptory challenges. Prospective jurors have a constitutionally protected right in fully participating in our democracy through jury service. See 3-4 supra. Apart from a Constitutional right, there is a strong societal interest in expanding and preserving this participation which, in turn, promotes the selection of a fair and inclusive jury, which, in turn, preserves the integrity of the criminal justice system. See id. at 6-7.

Applying this fourth factor, courts consider whether one litigant's claim impinges the exercise upon another person's constitutional rights. For example, since a criminal defendant had a Constitutional right to bail, the State bears the burden of persuasion when it seeks to impinge upon that right by claiming that the bail was posted with criminally derived funds, Casavina, 163 N.J. Super. at 31, or that the defendant was not eligible to post a 10% cash alternative to a surety bond, Wright, 401 N.J. Super. at 150.

Similarly, it is submitted that a prospective juror's right or interest in fully participating in our democracy through jury service overwhelmingly supports allocating the burden of persuasion upon the litigant who seeks to preclude that juror from exercising that right.

This burden shift also promotes the rights of litigants to a fair jury. By placing the burden upon striking counsel to demonstrate that they did not rely upon racial stereotyping to identify which jurors to exclude through a discretionary strike, it is reasonable to anticipate that reliance upon such racial stereotypes will dramatically decrease. (See Ex. A. at 8 (attorney self-regulation)). This prediction can be empirically tested by including this alternative proposal in the JCJS pilot program. Counsel's reliance upon these stereotypes to identify so-called "extreme" jurors has resulted in grossly disproportionate exclusion of jurors on racial grounds. (See Comment 13 at 8-9).

Rather than leaving the racial composition of the jury to the vagaries of counsel's "canceling out" of jurors that they perceive to be "extreme," the burden shift would promote the selection of a jury through

a process which is much less tolerant of such racial stereotyping. Id. See also JCJS Panel (Justice Albin)(rhetorically questions the rationality of this "cancel out" procedure). Accordingly, it is also reasonable to anticipate that the resulting jury would more fairly represent a cross-section of the community, thereby promoting public confidence in the jury selection process and in the jury's subsequent verdict. See JCJS I at Attachment I (notes inclusive jury promotes public confidence).

Under factor four, the competing interests are reflected in arguments articulated by trial counsel in their efforts to preserve peremptory challenges. It is submitted that the comparative weakness of these interests has been fully demonstrated my earlier comments to the JCJS. See Comment 13 at 3-10, citing, Ex. A. at 13-19. That comparative weakness further supports the burden shift proposed in Step 3.

As an alternative to eliminating peremptory challenges, the JCJS majority seeks to address their discriminatory use by reducing their number and by modifying Washington GR 37. (See JCJS II at 37-42). Since the Washington Constitution arguably provides some protection to peremptory challenges, GR 37 itself was a compromise to peremptory challenge elimination. (See 2 supra). Clearly, the GR 37 and R. 1:8-3 "objective observer" standard is an improvement over the totally ineffective subjective intent standard of Batson/Gilmore. However, since they still require the trial court to evaluate counsel's intent, albeit objectively viewed, they contain the same fundamental structural flaw as the Batson/Gilmore paradigm. See Ex. C. at 2. Seeking to reduce the impact of this flaw, GR 37(c)(d) and R. 1:8-3 effectively eliminate Batson's prima facie case requirement. Upon request of the court or opposing counsel, they impose a burden of production upon the striking party to articulate a nondiscriminatory reason for the preemptory strike. However, similar to Batson, both GR 37(e) and R. 1:8-3 retain the ultimate the burden of persuasion upon the objecting party.

To remedy these flaws and to more fully protect a prospective juror's right to serve on a jury, *it is submitted that New Jersey should adopt a version of GR 37 which places not only the burden of production, but also the burden of persuasion, upon the striking party.* Under Step 3 the striking party must establish that an "objective observer" would[10] not find that their removal of a prospective juror was based on that juror's race. Cf. GR 37(e) (places burden on objecting party; uses "could" standard; limits proscription to race).

Significantly, this reallocation of the burden of persuasion is consistent with GR 37's elimination of Batson's prima facie case requirement. See Proposed New GR 37, Jury Selection Workgroup, Final Report at 4. The Washington Supreme Court Workgroup recognized that "[h]istorically, the burden has rested with the objecting party. Therefore, instead of requiring the ...objecting party to prove a prima facie case of discrimination against a particular juror, the workgroup members generally agreed [that] the burden should be carried by the striking party to give reasons to justify the peremptory challenge ...." Id. Thus, the JCJS majority's reliance upon Washington GR 37 is fully consistent with its further modification to reallocate of the burden of persuasion to the striking party.

E. Participation in the Pilot Program.

Concerning the use of peremptory challenges, the United States Supreme Court views the various States as the "laboratory in which the issue receives further study." McCray v. New York, 461 U.S. 961, 963 (1983). Consistent with this view, the JCJS in recommendation 13 proposes a voluntary pilot program involving a consent-based reduction in peremptory challenges available to each party. (JCJS II at 4). This program is designed to "explore and assess recommended reforms to jury selection." (JCJS II at 15). JCJS recommended modification to R. 1:8-3 will be part of this pilot program.

The Alternative Procedure proposed in this letter is a significant departure from both the existing Batson/Gilmore paradigm and the JCJS recommended R. 1:8-3. Accordingly, to facilitate the Court's assessment of this procedure, it is respectfully submitted that it should be included in any pilot program.

F. If the Legislature Declines to Enact JCJS Recommendations to Reduce or Eliminate Peremptory Challenges, then the Court Should Implement Them Through Rulemaking.

The Supreme Court possesses authority to promulgate Rules under the rulemaking clause on matters of procedure. See, Art. VI, Sec. II, Par. 3 (1947), interpreted in, Winberry v. Salisbury, 5 N.J. 240, 245 (1950), cert. denied, Winberry v. Salisbury, 340 U.S. 877 (1950). More recently, the Court in State v. Andujar clarified the breadth of its rulemaking authority in connection with jury selection procedures. 247 N.J. at 306. More specifically, the Andujar Court noted that "the Constitution reposed in the Supreme Court the responsibility to see that all aspects of jury procedure – so uniquely vital to our system of judicial administration – are preserved, maintained and developed to pay their essential part in meting out justice." Id., quoting, In re Supervision of Petit Jury Panels, 60 N.J. 554, 562 (1972). The Andujar Court then exercised its constitutional rulemaking authority to outline a "framework" for conducting continued background checks of prospective jurors. 247 N.J. at 308, citing, N.J. Constit. Art. VI, § 2, ¶ 3. Since the background check was made in connection with the exercise of a peremptory challenge, this ruling establishes that the exercise of peremptory challenges is a matter of "practice and procedure" exclusively within the Court's rulemaking power. Id. at 306-08.

As a matter of comity, the Court previously declined to exercise its supervisory or rule-making authority when the Legislature declined to enact recommendations to eliminate or reduce peremptory challenges which were made by the Weiss Committee in 1997 and the Lisa Committee in 2005. Noting that it was faced with a "actual live challenge" presented by a juvenile awaiting resentencing, the Court in State v. Comer, concluded that "we cannot elide a question because the Legislature may act in the future." 249 N.J. 359, 405 (2022)(two year period). Since the legislature has declined to act upon the

Weiss Committee's recommendations to reduce peremptory challenges in 1997, "actual live challenges" have been presented by thousands of defendants whose rights to a fair and inclusive jury have been compromised through the exercise of peremptory challenges under the existing Batson/Gilmore paradigm. Similarly, these procedures have deprived thousands of prospective jurors of their right to fully participate in our democracy through jury service during these 25 years. As the Powers Court recognized, these prospective jurors have little incentive to vindicate their rights during the course of the criminal trial to which they were summoned. 499 U.S. 410-16.

In the event that the Legislature declines to enact JCJS recommendations to reduce or eliminate peremptory challenges, it is respectively submitted that the Court should speak for these jurors by no longer deferring to the Legislature on this procedural issue, the resolution of which is essential to the integrity of the entire criminal justice system. Cf. Abbot v. Burke, 149 N.J. 145, 202 (1997) (school funding decisions: Court initially deferred, then ruled once Legislature repeatedly declined to act). Accord State v. Comer, 249 N.J. at 405 (despite two years of Legislative inaction, Court promulgates 20-year look-back procedure for sentencing a juvenile offender).

Once again, thank you for allowing me to share my thoughts on these important issues.

Very truly yours,

Martin Cronin, J.S.C.

MGC:tmh

Cc: Hon. Shelia Venable, A.J.S.C.
Hon. Mark S. Ali, P.J. Cr.

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[1] Judicial Conference on Jury Selection Recommendations for Improving Jury Selection at 5, 23 (April 28, 2022)(hereinafter " JCJS II"). This letter incorporates by reference my letter commenting on JCJS recommendation 13 (June 8, 2022)(hereinafter "Comment R.13") which in turn, incorporated the following documents attached thereto: Supreme Court Committee on Jury Selection in Civil and Criminal Trials (June 25, 2019)(Ex. A.), excerpts from an unofficial transcript of oral argument before the New Jersey Supreme Court in State v. Andujar (Ex. B.), my prior memorandum regarding Washington GR 37 (Jan. 13, 2020)(Ex. C). Exhibits A – C are also attached to this letter.

[2] The JCJS recommends extending R. 1: 8-3 to all persons protected under the New Jersey Law Against Discrimination. Similar to Washington GR 37, my recommendation is to initially limit R. 1:3-8's prohibition to race. During the pilot program, the Court and other stakeholders can assess the proposed rule's operation. Thereafter, stakeholders may determine the rule's scope based upon a more robust implementation record.

[3] By employing an "objective observer" standard and shifting the burden of *production* to the striking party, both GR 37 and JCJS proposed R. 1:8-3 meaningfully address some of Batson's many shortcomings. Unfortunately, they both preserve peremptory challenges and continue Batson's allocation of the burden of *persuasion* upon the objecting party. While the JCJS proposed R. 1:8-3 is silent of this issue, GR 37 expressly places the burden of persuasion upon the objecting party.

[4] The absence of a constitutional basis is reflected in the evolution of Batson's first prong in New Jersey, from a "substantial likelihood" in Gilmore, to an "inference of discrimination" in Osorio, to "good faith" in the JCJS proposed R. 1:8-3. See Andujar, 247 N.J. at 300, JCJS II at 37.

[5] The Court's decisions in Andujar, 247 N.J. at 302, and Gilmore. 103 N.J. at 529, recognize the corrupting effects of both explicit and implicit bias upon trial counsel's exercise of peremptory challenges. (See also, Ex. A. at 7). In Andujar, the Court further recognized that the existing Baston/Gilmore paradigm has not been fully effective in eliminating these

corruptive effects. Andjuar, 247 N.J. at 302. See also Ex. A. at 11 (cause challenge does not violate rights of prospective juror).

[6] The terms "fair" and "impartial" mean an absence of case specific bias – the same definition used by the Court in Gilmore, 103 N.J. at 529, cited in, Ex. A. at 3 n. 18.

[7] 3/3 is selected because, as a practical matter, at least three challenges are required before objecting counsel can establish a prima facie case under the Batson/Gilmore paradigm. In a sense, it is the obverse of the "house money" that many criminal practitioners were willing to forego by agreeing to an 8/6 reduction in peremptory challenges. (See Comment 13 at 10-11.)

[8] While this perception will be based upon facts insufficient to support a cause challenge, see Step 1, it cannot be based upon a racially discriminatory purpose, see Step 3.

[9] The importance of this juror and case specific record supports JCJS recommendation 13 for more direct attorney questioning during voir dire.

[10] While the GR 37 workgroup agreed to reallocate the burden, they sharply disagreed on the applicable causation standard (i.e., "could" verses "would"). Id. at 6. Some members observed that since anything is possible, the "could" standard may be too expansive. See id. at Appendix 2, p. 2 (comments of Chief Justice Fairhurst). In its proposed R. 1:8-3, the JCJS prudently adopted the "would" standard (See JCJS II at 38).